LIM SEANG MEE

v.

KEEPAHEAD HOLDINGS SDN. BHD.

HIGH COURT MALAYA, PULAU PINANG
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. 24-26-1992]
17 FEBRUARY 1992

LAND LAW: *Housing Developers - Deed of assignment - Whether it is the developer's obligation to endorse or just discretion to grant its consent - Administrative fee to grant consent.*

In this originating summons, the plaintiff seeks the following reliefs:

1. The determination by the Court that it is the conveyancing and banking practice in Malaysia for banks/finance companies ("the financier") which are financing the purchase of a flat to which strata titles have yet to be issued to require from the following developer of such a flat the following:

   (i) an endorsement of developer's acknowledgment of the assignment of the property on:

      (a) the need of assignment to be made between the original purchaser and a subsequent purchaser and;

      (b) the deed or other instrument of assignment to be made between such subsequent purchaser and the financier; and

   (ii) a written undertaking that the developer will deliver to the financier the issue document of strata title to the flat upon the issuance of such title together with a valid and registrable memorandum of transfer.

2. A declaration that the defendant is not entitled and has no legal right to charge the plaintiff fees amounting to RM2,000 for consent to endorse on the deed of assignment made or to be made between the plaintiff and the purchaser in respect of the property and or for giving to the purchaser's financier the undertaking referred to above.

Held:

[1] The defendant should exercise its discretion by giving its consent to an assignment of rights of the purchaser to a third party and its undertaking to execute a valid memorandum of transfer in favour of the third party upon the issue of the strata title of the said property subject to the payment by the plaintiff of the administrative fee.

[2] The defendant is entitled to payment of administrative fee for doing something outside the terms and conditions of the said agreement.

[3] A fair reasonable amount for endorsing the deed of assignment and giving an undertaking to deliver the title and memorandum of transfer should be a sum of RM500.

[4] Accordingly, the defendant is directed to sign the endorsement on the deed of assignment and to give a written undertaking to deliver the strata title and a valid registrable memorandum of transfer to the assignee in due course upon the plaintiff paying a sum of RM500 as administrative fee.

[Order accordingly.]

Legislation referred to:
Housing Developers (Control and Licensing) Regulations 1989, r. 11(2)

For the plaintiff - Charles Rajah (Lim Seang Lee with him); M/s. Charles Rajah, Lim Seang Lee & Co.
For the defendant - Ghazi Ishak; M/s. Presgrave & Matthews

JUDGMENT

Mohamed Dzaiddin J:

In this originating summons the plaintiff seeks the following reliefs:

1. The determination by this Honourable Court that it is the conveyancing and banking practice in Malaysia for banks/finance companies (the financier) which are financing the purchase of a flat to which strata titles have yet to be issued to require from the developer of such a flat the following:

   (i) an endorsement of developer's acknowledgment of the assignment of the property on (a) the deed of assignment to be made between the original purchaser and a subsequent purchaser and; (b) the deed or other instrument of assignment to be made between such subsequent purchaser and the financier; and

   (ii) a written undertaking that the developer will deliver to the financier the issue document of strata title to the flat upon the issuance of such title together with a valid and registrable memorandum of transfer.

2. A declaration that the defendant is not entitled and has no legal right to charge the plaintiff fees amounting to RM2,000 for consent to endorse on the deed of assignment made or to be made between the plaintiff and the purchasers in respect of the property and or for giving to the purchasers' financier the undertaking referred to above.

The background to this case can be shortly summarised. By a sale and purchase agreement dated 14 March 1990 (the said agreement) the plaintiff agreed to purchase a flat identified as Parcel No. 6, Storey No. 4, Block A, Medan Lumba Kuda, Pulau Pinang (the said property) from the defendant, a licensed housing developer at a purchase price of RM106,888 and upon the terms and conditions of the said agreement. Payment of the purchase price was made in stages and on 13 December 1991 the plaintiff fully paid the said purchase price. In the meantime, on 11 September 1991 the plaintiff entered into a purchase agreement with Tung Sen Jit and Lily Chee (joint purchasers) whereby he agreed to sell to the latter jointly the said property upon the terms and conditions contained in the sale agreement. In order to facilitate the application for a bank loan to purchase the said property, the solicitors for the joint purchasers wrote to the plaintiff's solicitors on 27 November 1991 requesting for a letter of undertaking from the defendant in terms that the defendant would, *inter alia*, deliver the document of strata title to the joint purchasers' bank free from encumbrances upon issuance of the strata title of the said property together with a valid and registrable memorandum of transfer.

By letter dated 10 December 1991 the joint purchasers' solicitors sent to the plaintiff's solicitors a deed of assignment, assigning the said property from the plaintiff to the joint purchasers, which also contained an endorsement in terms, *inter alia*, that the defendant do acknowledge the said assignment and do undertake to execute a registrable transfer of the said property in favour of the joint purchasers or their nominee or nominees once the strata title is issued. Accordingly, by letter dated 14 December 1991 the plaintiff's solicitors wrote to the defendant requesting for a letter of undertaking and for the defendant's endorsement

to the deed of assignment as required by the joint purchasers' solicitors. On 18 December 1991 the plaintiff's solicitors received a reply from the defendant's solicitors Messrs. Presgrave & Matthews. For the sake of clarity, this letter reads as follows:

18 December 1991

M/s. Charles Rajah, Lim Seang Lee & Co.
Advocates & Solicitors
Room 303, 3rd Floor
Wisma Hong Bee
No. 50-J, Pengkalan Weld
10300 Penang

Dear Sirs

Vendor : Lim Seang Mee

Purchasers : Tung Sen Jit @ Tang Seu Jit & Chee Chang Hwa @ Lilly Chee

Property : Parcel 6 Storey 4 Block A Medan Lumba Kuda, Penang

With reference to the above matter and write to inform you that we act on behalf of Keepahead Holdings Sdn. Bhd.

We further refer to your letter dated 14 December 1991 and write to inform you that our clients will consent to endorse the deed of assignment to be made between the vendor and the purchasers provided:

1. that such endorsement of consent is in our clients' standard format (a copy is enclosed) for your attention
2. the administrative fees amounting to RM2,000 is first received by our client and our legal fees and disbursements amounting to RM160 is received by us
3. that your clients settle the sum of RM107.72 being interest on late payment and the sum of RM1,350 being service charges, such sums are still owing to our client as per the statement of account dated 1 November 1991
4. the purchasers undertake to comply with all the terms and conditions contained in the sale and purchase agreement dated 14 March 1990 made between our clients of the one part and the vendors of the other part (principal agreement). Such undertaking is to be incorporated into the deed of assignment to be made between the vendor and the purchaser.

In this connection we return herewith the 4 copies of the said deed of assignment for your necessary amendments.

Kindly acknowledge receipt by signing and returning to us the duplicate copy of this letter.

Yours faithfully,

Presgrave & Matthews

In reply, the plaintiff's solicitors by their letter dated 24 December 1991 informed the defendant's solicitors that the plaintiff was not obliged to pay the administrative fee of RM2,000 but as a gesture agreed to settle the legal fee and disbursement of RM160.

Before me, Encik Charles Rajah, for the plaintiff, submitted that as the developer was unable to give strata title to the plaintiff, it has become the practice of developers to endorse on the deed of assignment of the property its acknowledgment of the said assignment and to

give an undertaking to a bank that it would deliver the strata title and a registrable memorandum of transfer in due course. Counsel submitted that there is a legal obligation on the part of the developer to comply with the purchaser's request pending the issuance of strata title.

On the issue of the defendant's demand for payment of RM2,000 for administrative fee as a prerequisite for signing the endorsement and providing the letter of undertaking, Encik Rajah submitted that the defendant is not entitled to such fee. The Housing Developers (Control and Licensing) Act 1966 (the Act) and the 1989 Regulations do not provide for the payment of any administrative fee and the said agreement is silent. According to Counsel, the payment of the said fee is expressly prohibited by r. 11(2) of the Regulations.

Encik Ghazi, Counsel for the defendant, submitted that a developer is under no legal obligations to endorse the assignment of property or to give a letter of undertaking to a third party. Relying on the affidavit of Chan Fock Seng (lampiran 7), Encik Ghazi submitted that in the present case the obligation of the defendant towards the plaintiff under the said agreement is complete once the full purchase price was paid except upon the issuance of strata title for the said property the defendant must hand it over to the plaintiff. Further, the defendant owed no legal obligation to the joint purchasers. As such the request of the plaintiff for the defendant to give the undertaking and to endorse the deed of assignment was outside the defendant's obligation under the said agreement and also outside the scope of the Act. In the circumstances, the defendant is entitled to ask for RM2,000 as administrative fee for endorsing the deed of assignment and providing the letter of undertaking. Finally, Counsel submitted the amount of RM2,000 was fair and reasonable.

My first observation on the matter, after studying the Act and the Regulations, seems to be this. There is no special provision in the Act or the Regulations made thereunder with respect to the right of purchaser to assign his rights and interest under a sale and purchase agreement with a housing developer to a third party. Even the said agreement, which is in standard form in Schedule H of the Regulations does not stipulate any provision to that effect I think it is within the developer's absolute discretion whether to grant its consent to the assignment. Secondly, it has become a conveyancing practice, which is founded on equitable principles that in the absence of an issue document of title, a deed of assignment of the property is good security for a housing loan to be granted by a bank/financial institution, the assignment of which must first be consented and endorsed by the vendor/developer. Hence, in order to facilitate any dealing of the property pending the issue of a QT/strata title, the deed of assignment assigning the rights of the purchaser to a third party must be endorsed by the developer. A new or sub-purchaser of the property will also require an undertaking by the developer to surrender the QT/strata title with a registrable memorandum of transfer to him in due course. Therefore, it has now become the practice of developers to demand payment of a sum of money which they call "administrative fee" as a prerequisite for giving their consent to any transfer or assignment of rights of the purchaser to a third party and for a giving a letter of undertaking to surrender the title deed and a duly executed transfer form in favour of the assignee or the third party upon the issue of the QT/strata title. In my opinion, this is not illegal because I believe a housing developer is entitled to demand payment of such administrative fee. Neither is it prohibited by the Act or the Regulations. Under the said agreement, the defendant is merely obliged under Clause 10 to apply for and obtain a strata title at its own cost and expense. Upon the issuance of the said strata title, and subject to the full payment of the purchase price and the observance of all the terms and conditions under the said agreement, the defendant shall within 21 days execute a valid transfer form to

the plaintiff or his assign. So, clearly, there is no obligation on the part of the defendant to give its consent to the deed of assignment.

Therefore, my answer to the first relief sought by the plaintiff is that the defendant should exercise its discretion by giving its consent to an assignment of rights of the purchaser to a third party and its undertaking to execute a valid memorandum of transfer in favour of the third party upon the issue of the strata title of the said property subject to the payment by the plaintiff of the administrative fee.

On the second relief, in my opinion, the defendant is entitled to payment of administrative fee for doing something outside the terms and conditions of the said agreement. However, the crux of the matter here is the quantum. Is the sum of RM2,000 for endorsing the deed of assignment and giving an undertaking to deliver the title and memorandum of transfer reasonable? It seems that it is not uncommon for some housing developers to demand for a flat sum of RM15,000 or as much as 5% of the purchase price from the purchaser to cover administrative costs. Because of no specific provisions in the Act or the Regulations, the developers appear to have a complete say as to the amount they are entitled to "squeeze" from the purchasers. It must be borne in mind that the purpose of the Housing Developers (Control and Licensing) Act 1966 and the Regulations made thereunder is to provide adequate protection to the purchasers. Yet, this is one area which the Act fails to control. It seems that in Singapore, its Housing Developers Rules 1976 as amended by the Housing Developers (Amendment) Rules 1981 provide that the maximum amount which developers may charge for administrative costs, including preparing a fresh agreement, is the sum of RM200. Perhaps, this is something which the Ministry of Housing and Local Government should take note and look into.

In my opinion, having regard to the fact that in this case the defendant is merely required to endorse its consent in the deed of assignment and to undertake to deliver the strata title and a valid memorandum of transfer the fee of RM2,000 demanded by the defendant from the plaintiff as its administrative fee is inordinately high. A fair and reasonable amount should be a sum of RM500. Accordingly, I direct the defendant to sign the indorsement on the deed of assignment and to give a written undertaking to deliver the strata title and a valid registrable memorandum of transfer to the assignee in due course upon the plaintiff paying a sum of RM500 as administrative fee.

I make no order as to costs.

Also found at [1992] 3 CLJ 1445